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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JAN 17 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an acupuncture business. It seeks to employ the beneficiary permanently in the United States as an acupuncturist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner did not establish its continuing ability to pay the proffered wage, and denied the petition accordingly.

On appeal, counsel asserts that the petitioner was already paying the beneficiary the proffered wage and that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."[1]

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[1] The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides that any three of the following may be accepted as evidence of exceptional ability: 1) Degree relating to area of exceptional ability; 2) Letter from current or former employer showing at least 10 years experience; 3) License to practice profession; 4) Person has commanded a salary or remuneration demonstrating exceptional ability; 5) Membership in professional association; 6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization. comparable evidence may be submitted if above categories are inapplicable. This evidence may

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on August 1, 2008, which establishes the priority date.[2] The proffered wage as stated on the ETA Form 9089 is $44,117 per year. The Form I-140 (Immigrant Petition for Alien Worker) was filed on April 15, 2009. On Part 5 of the Form I-140, the petitioner states that it was established on November 1, 2002, claims two employees, and claims a gross annual income of $67,700. Net annual income is not stated and claimed to be confidential.

On Part H of the ETA Form 9089, the petitioner specifies that no training and no experience is required for the certified job. The only requirements are that the beneficiary possess a Master's degree in Oriental Medicine[3] and must be a [redacted] licensed acupuncturist. The record indicates that the beneficiary possessed the requisite education and licensure as of the priority date. The ETA Form 9089 was signed by the beneficiary on April 10, 2009. Part K instructs that all jobs that the alien has held for the past 3 years to be listed. No job experience is listed. It is noted that in a letter, dated April 10, 2009, the petitioner claims that it has employed the beneficiary as an acupuncturist

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include expert opinion letters.

These criteria serve as guidelines, but evidence that a beneficiary may meet three of these criteria is not dispositive of whether the beneficiary is an alien of exceptional ability. It must also be established that the beneficiary possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business. This has not been asserted in this case and the AAO finds no evidence in the record that the beneficiary would qualify for a classification as an alien of exceptional ability.

[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

[3] The employer also indicates that a foreign educational equivalent is not acceptable.

since June 2006.[4] On a Form G-325A, Biographic Information, signed by the beneficiary on September 26, 2007, which was submitted in support of a Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary claimed no employment for the previous five years. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is one of the essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioner will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In this case, the sole proprietor, through counsel, has provided a copy of the beneficiary's Wage and Tax Statement (W-2) for 2008. It states that the petitioner paid the beneficiary gross wages of $24,080. According to counsel's assertion on appeal, the W-2 reflects approximately seven months of wages because the petitioner hired the beneficiary as an acupuncturist in June 2008.[5] No exact starting date of the beneficiary's employment in 2008 has been provided. Counsel maintains that the petitioner paid the beneficiary the proffered wage during the period covered by the W-2. It is noted that if $24,080 is an accurate amount of wages paid to the beneficiary in 2008 as indicated on

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[4]It appears that the beneficiary was employed as an acupuncturist prior to her licensure by the [redacted].

[5]As noted above, the petitioner asserts in another letter that it has employed the beneficiary since June 2006. In a prior application that the petitioner filed on the beneficiary's behalf in October 2007, the petitioner did not claim to employ the beneficiary. As noted above, the petitioner must resolve this inconsistency. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

the Form W-2, then she was paid less than the proffered wage. At a monthly rate of $3,676.42, seven months of the proffered wage would amount to $25,734.94 or $1,654.94 more than was paid to the beneficiary.[6]

It is noted that other documentation of wages paid to the beneficiary in 2008 includes two copies of state quarterly wage and withholding reports filed by the petitioner in the third and fourth quarters of 2008. No state quarterly wage report was submitted for the second quarter (April, May, June) of 2008. The wage reports provided identify the beneficiary as the only employee and indicate that for each of the third (July, August, September) and fourth (October, November, December) quarters of 2008, the petitioner paid the beneficiary $10,320 in total wages. As this represents a total of $20,640 for six months, it represents $1,418.50 less than the proffered wage of $22,058.50 for the same period. It is additionally noted that the petitioner has provided hand-written payroll records of the beneficiary's wages during 2008. Fifteen payments of gross wages of $1,720 are stated, beginning on June 14th, totaling $25,800. Accompanying these records are copies of checks written to the beneficiary indicating the net amount of $1,434.66 on each check. However, checks for the first eight pay periods are omitted and two of the checks shown for the November 28, 2008 and the December 12, 2008 pay periods do not reflect that they were negotiated. It is further noted that the total amount of these payments for gross wages was $25,800, which is even more than that claimed on the W-2, even though the last pay check was dated December 26, 2008. As the petitioner has not offered any clarification of these discrepant amounts on any of these documents, we cannot accept the petitioner's assertion that the beneficiary has been paid the full proffered wage in 2008 and will only accept the amount shown on the beneficiary's 2008 Form W-2. In any further filings, the petitioner must clarify the discrepancies in pay and the beneficiary's W-2 statement. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592.

Similarly, for 2009, copies of internal payroll records indicate that the petitioner paid gross wages of $1,720 to the beneficiary for each of twelve pay periods from January 9, 2009 to August 21, 2009, however there is no record of employment or wages paid for April and May 2009. This suggests

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[6] Generally, USCIS does not prorate the proffered wage when it amounts to applying 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, as noted above, the petitioner has not submitted a complete history of payment of wages to the beneficiary in the form negotiated pay checks from the priority date forward and has not reconciled the inconsistent amounts as noted above.

that the petitioner has not employed the beneficiary full-time. It is noted that the certified job offer must be for employment which is permanent, full-time work by an employee for an employer other than oneself. 20 C.F.R. § 656.3. Further, copies of only three negotiated checks have been submitted, and no copies of state quarterly wage reports or any other evidence consistent with the requirements of 8 C.F.R. § 204.5(g)(2) have been provided for 2009. The current record does not establish the petitioner's ability to pay the proffered wage of $44,117 for 2009. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). For this reason, sole proprietors provide evidence of the individual monthly household expenses to be considered as part of their ability to pay the proffered wage.

In response to the director's request for evidence, the petitioner submitted a summary of monthly household expenses. The petitioner provided a monthly total of $2,698.54 of individual monthly household expenses, which would amount to $32,382.48 per year.

Further, the petitioner also submitted a copy of the sole proprietor's 2008 individual tax return. It shows that the sole proprietor claimed no wages, salaries tips, etc; business income of $33,722; and an adjusted gross income of $31,271 on line 37 of page 1.

It is noted in *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, after deducting annualized household expenses of $32,382.48 from the adjusted gross income of $31,271, the remaining -$1,111.48 would not be sufficient to cover any shortfall resulting as a comparison of actual wages paid to the beneficiary and the proffered wage of $44,117. Additionally, as noted above, the evidence is insufficient to demonstrate that the petitioner has established its ability to pay the proffered wage in 2009.[7] Therefore, it may be concluded that the current record does not establish its continuing financial ability to pay the proffered wage from the priority date onward pursuant to the regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2).

In some circumstances, the principles set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. *Sonegawa* related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this matter, there is insufficient evidence upon which to conclude that the petitioner's circumstances justify approval based on *Sonegawa*, when the only tax return[8] submitted with the instant filing indicates a modest adjusted gross income as mentioned above, and other evidence submitted has not established that the petitioner has paid the proffered wage to the beneficiary or has employed her full-time as indicated above. No other evidence of cash or cash equivalent assets from which the proffered wage may be paid or to support the sole proprietor's personal expenses has been submitted and no other evidence similar to that discussed in *Sonegawa* has been provided that would demonstrate that such unusual and unique circumstances would apply here. In any further filings,

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[7] The appeal was filed on December 21, 2009. Counsel did not request additional time to send any additional information or subsequently submit the beneficiary's 2009 W-2 statement.

[8] The record contains the sole proprietor's 2006 Form 1040 and Schedule C from an earlier filing. This return reflects adjusted gross income of $16,503 (approximately one-half less than the sole proprietor's self-estimated annual personal expenses) and Schedule C total gross receipts of $67,770, just slightly above the beneficiary's total proffered wage in the instant filing.

should the petitioner seek to rely on *Sonegawa,* the petitioner would need to submit evidence of its reputation, any short term losses, and/or additional tax returns or financial information to establish a pattern of historical growth as the record before us lacks such information and would not allow us to conclude that the petitioner can pay the proffered wage based on a totality of the circumstances.[9]

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

[9] Additionally, in any further filings, the petitioner must resolve the conflicts in the evidence of pay and dates of employment as set forth above, and establish that the position is for a full-time worker. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Also, should the sole proprietor seek to rely on individual cash assets to pay personal expenses, such evidence should be submitted, as well as regulatory evidence related to the petitioner's ability to pay the proffered wage in 2009 and subsequent years to include the petitioner's tax return, audited financial statements, or annual reports.